### UNITED STATES OF AMERICA NATIONAL LABOR RELATIONS BOARD

AMERICOLD LOGISTICS, LLC,

Employer,

and

Case No. 25-RD-108194

KAREN COX,

Petitioner,

and

RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, UFCW, LOCAL 578

Intervenor.

### **PETITIONER'S BRIEF**

On June 18, 2012, Americold Logistics (the "Employer") voluntarily recognized the Retail, Wholesale, and Department Store Union, UFCW, Local 578 (the "Union"). Over one-year later, on June 27, 2013, Ms. Karen Cox filed a petition for a decertification election. The Regional Director ordered an election, as more than one year had passed and no election bar could exist. The Regional Director was correct in ordering an election, and thereby effectuating the NLRA's overarching preference for employee free choice, because a voluntary recognition bar, absent any unfair labor practices, cannot last longer than one year.

Additionally, even if the Regional Director was incorrect in finding an election bar could no longer exist (which he was not), a reasonable time to bargain had passed. Indeed, the reasonable time to bargain passed when Ms. Cox filed her earlier decertification petition in April, 2013, which is pending before this Board on her Petition for Review. *Americold Logistics*, Case

No. 25-RD-102210. Accordingly, the Board should uphold the Regional Director's well-reasoned decision directing an election.

This is Ms. Cox's third petition in this matter. Ms. Cox filed her first petition (hereinafter "Petition 1") on November 19, 2013. *See Americold Logistics*, Case No. 25-RD-093419. This petition was dismissed because the parties had not yet bargained for six months. Ms. Cox filed her second petition (hereinafter "Petition 2") on April 8, 2013, one day before the parties had bargained for six months. *See Americold Logistics*, Case No. 25-RD-102210. The Regional Director denied an election as he concluded the parties had not been given a reasonable time to bargain. Ms. Cox has requested review of this decision. After an election was denied in Petition 2, she filed this petition over one year after recognition (hereinafter "Petition 3").

### INTRODUCTION AND STATEMENT OF THE ISSUE

Congress granted unions that go through the crucible of a secret-ballot election a single year to shield themselves from a representation challenge. *See* NLRA Section 9(c)(3), 29 U.S.C § 159(c)(3). In this case, the Union seeks a voluntary recognition bar extending well beyond the congressionally created certification bar. This makes no logical sense given the express statutory language in Section 9(c)(3). The Board's voluntary recognition bar cannot last *longer* than the congressionally-created certification bar, where, as here, there have been no unfair labor practices by the employer.

In *Lamons Gasket Co.*, 357 NLRB No. 72 (Aug. 26, 2011), the Board overturned *Dana Corp.*, 351 NLRB 434 (2007), which had allowed employees to immediately petition for decertification after an employer's voluntary recognition of a union. In so doing, the Board reasoned employees could still exercise their free choice to challenge union representation after a voluntary recognition, but only after the union was given a reasonable time to bargain. *Lamons* 

Gasket, at slip op. 14. Here, the Union seeks to block an election by claiming the voluntary recognition bar can exist after one year has passed. The Union latches on to an alleged ambiguity in Lamons Gasket where the Board said, "we define a reasonable period of bargaining, during which the recognition bar will apply, to be no less than 6 months after the parties' first bargaining session and no more than one year." Id. Contrary to the Union's argument, there is no ambiguity here. The basic terms of the NLRA compel the Board to construe "no more than one year" to mean one calendar year from the date of the voluntary recognition. Otherwise, the voluntary recognition bar will provide a greater shield to a representation challenge than Congress' statutorily-enacted certification bar. The Union's position is meritless given the Board's own preference for secret ballot elections and its oft-stated understanding that voluntary recognitions are not entitled to the same level of Board protection as secret ballot elections. See Levitz Furniture Co., 333 NLRB 717, 723 (2001) ("we emphasize that Board-conducted elections are the preferred way to resolve questions regarding employees' support for unions.").

Indeed, *Lamons Gasket* itself specifically recognizes that an election is the only way for a union to have a "12-month bar to election petitions under Section 9(c)(3)," 357 NLRB at slip op. 14 n.35, and that its decision does not equate "the processes of voluntary recognition and certification following a Board-supervised election." *Id.* at slip op. 14. The Union's position would turn *Lamons Gasket* on its head.

Even assuming, *arguendo*, that the Regional Director's decision was incorrect, the Union has been given a reasonable time to bargain. If a recognition bar still exists, the reasonable time to bargain is determined by the application of the five-factor *Lee Lumber* test. 334 NLRB 399, 405 (2001). The five factors are: "(1) whether the parties are bargaining for an initial contract; (2) the complexity of the issues being negotiated and of the parties' bargaining process; (3) the

amount of time elapsed since bargaining commenced and the number of bargaining sessions; (4) the amount of progress made in negotiations and how near the parties are to concluding an agreement; and (5) whether the parties are at impasse." *Lamons Gasket*, 357 NLRB slip op. at 10, n.34. The burden is on the Union to show further bargaining should be required. *Id.* at 10. Three of the *Lee Lumber* factors weigh strongly in favor of holding the election: the amount of time elapsed since bargaining commenced and the number of bargaining sessions; the complexity of the issues being negotiated; and the amount of progress made in negotiations. The facts in Petition 3 demonstrate a reasonable time to bargain had elapsed in April 2013, when Petition 2 was filed.

#### **STATEMENT OF FACTS**

The bargaining unit consists of two related facilities, one half mile apart, in Rochelle, Illinois. Each facility engages in the warehousing and distribution of refrigerated and non-refrigerated products. At the time this petition was filed, the bargaining unit was comprised of 110 employees.

On May 22, 2012, the Union petitioned the NLRB for a secret-ballot election, seeking to win the advantages of the certification bar. However, on June 7, 2012, the Employer and Union held a "card count" to determine if the Union represented a majority of employees and the Union withdrew its election petition. Thereafter, the parties executed a voluntary recognition agreement on June 15 and June 18, 2012.

At this juncture an obligation attached to the Employer and Union to bargain. However, the Union delayed bargaining for 113 days, nearly four months, after recognition. First, the Union attempted to elect stewards and a bargaining committee, but due to poor organization and communication, and despite having access to employee addresses, bulletin boards in the

<sup>&</sup>lt;sup>1</sup> See Americold Logistics, Inc., 25-RC-081531.

workplace, and member information from authorization cards, it took the Union two separate meetings to elect its officers. Tr. 40:15-21; 41:14-19.<sup>2</sup> The Union thereafter held a number of meetings to determine its bargaining positions, further contributing to the delay. The Union held four to six meetings with employees over a four month period following the voluntary recognition. Tr. 42:11-13; 106:6-8. Tr. 106:9-25. These "planning" meetings could have taken place within days after recognition. Given the size of the bargaining unit, and the Union's familiarity with the bargaining process, it could have accomplished this pre-negotiation planning in less time than four months.

Adding to this delay, the Union took until July 30, 2012, seven weeks post-recognition, to request information in preparation for contract negotiations. The Employer provided a timely response to this request on August 16, 2012, however the Union did not feel ready to go to the bargaining table until "mid-September." Tr. 48:9-10 (the exact date the Union first requested bargaining dates is not in the record). The Employer met on the first dates it was provided, because the Union witness admitted the Employer never rejected any dates to bargain. Tr.98:20-25; 99:1-6; 157:21-23.<sup>3</sup>

Between October 9, 2012 and June 26, 2013, the parties held twenty-one bargaining sessions. The Employer canceled bargaining sessions in January and February because its lead negotiator's wife had cancer and was starting treatment. *See* Tr. 147:8-12; 152:2-6; 153:20-24.

<sup>&</sup>lt;sup>2</sup> Cites herein are to the April (Tr. x:x) and July (Tr.2. x:x) transcript from the hearings conducted on Ms. Cox's petitions.

<sup>&</sup>lt;sup>3</sup> The Union's Request for Review took great pains to paint a picture of a recalcitrant Employer. Full consideration of the record shows the Union was primarily responsible for the longest delay in bargaining (from June to October, 2012), and no meetings were scheduled in December 2012 due to *mutual* unavailability. Tr. 48:20-22; 61:7; 102:25-103:2; 151:1-4. Moreover, given the voluntary recognition, the number of bargaining sessions, the time devoted to bargaining, and the fact a contract was agreed to, it is difficult to understand how the Union could paint the Employer as recalcitrant and averse to bargaining. To follow the progress of bargaining between the parties, one need only to refer to the Request for Review in *Americold Logistics*, 25-RD-102210. Regardless, the process of bargaining is irrelevant here because more than one year has passed and no election bar can exist.

The parties doubled the number of sessions in March to account for this unfortunate occurrence. By March 2013, after twelve bargaining sessions, the parties had agreed on almost all of the non-economic terms of the contract and had started negotiations on the economic terms. Eventually, the parties reached a tentative agreement on June 26, 2013, which required Union ratification. The Union ratified the contract on June 29, 2013.

#### **ARGUMENT**

- I. The Regional Director's Decision to Order an Election Was Correct Because More Than One Year Has Passed Since Voluntary Recognition and There Have Been No Employer Unfair Labor Practices.
  - A. Certification Holds More Advantages Than Mere Voluntary Recognition, Including a Maximum Twelve-Month Bar to Elections.

A voluntary recognition is fundamentally different from a "solemn" secret-ballot election conducted under the Board's "laboratory conditions." *Brooks v. NLRB*, 348 U.S. 96, 99 (1954); *General Shoe Corp.*, 77 NLRB 124, 127 (1948). A Board election and the Board certification that follows occupy a preferred place under the NLRA:

There is no doubt but that an election . . . conducted secretly . . . after the employees have had the opportunity for thoughtful consideration, provides a more reliable basis for determining employee sentiment than an informal card designation procedure where group pressures may induce an otherwise recalcitrant employee to go along with his fellow workers.

*NLRB v. Cayuga Crushed Stone*, 474 F.2d 1380, 1383 (2d Cir. 1973). That is why "secret elections are generally the most satisfactory–indeed the preferred–method of ascertaining whether a union has majority support." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969).

Recognizing the importance of the secret ballot and the formal Board certification that follows, Congress mandated a one-year election bar following such certifications. *See* 29 U.S.C § 159(c)(3). Absent unusual circumstances, the certification year rule both prohibits the

employer from withdrawing recognition and bars employees from filing election petitions for a one-year period, irrespective of loss of majority status.

Because voluntary recognition is a less reliable method of determining employee sentiment than the secret-ballot, the Board has always given it fewer protections. *Lamons Gasket*, at slip op. 6 (finding voluntary recognition carries fewer "attendant legal advantages"). After voluntary recognition, a union is only given a "reasonable period" to shield itself against a representation challenge. *See Lee Lumber & Bldg. Material Corp.*, 334 NLRB 399 (2001); *Keller Plastics E., Inc.*, 154 NLRB 583 (1966). An "election remains the only way for a union to obtain Board certification and its attendant benefits." *Lamons Gasket*, 357 NLRB slip op. 14.

Given an election is the gold standard for determining employee sentiment, the recognition bar cannot last longer than the one-year certification bar. <sup>4</sup> The Union itself recognizes this point, when it states: "clearly the Board did not intend in *Lamons Gasket* to confer greater protection to voluntary recognition than Board certification." Union Request for Review at p.9. Here, more than one year has passed since the Union was voluntarily recognized. Accordingly, the Regional Director's decision to order an election upholds and furthers the Board's historical view of the recognition bar vis-à-vis the certification bar.

## **B.** Overturning the Regional Director's Decision Would Elevate Voluntary Recognition Above Certification.

To dismiss this petition would raise the voluntary recognition bar above the certification bar. This result is untenable. *Lamons Gasket* states: "[a]n election remains the only way for a

advantages. Lamons Gasket, 357 NLRB at slip op. 3 n.6.

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<sup>&</sup>lt;sup>4</sup> Indeed, if it did, unions would have no reason to petition for a certification election after voluntary recognition because it would already enjoy the advantage of a one-year bar. This result would be inconsistent with the fact that the Board encourages unions, after a voluntary recognition, to petition for an election in order to obtain certification, with its attendant statutory

union to obtain Board certification and its attendant benefits. Neither the pre-*Dana* law nor the law after today equates the processes of voluntary recognition and certification following a Board-supervised election." *Id.* at slip op. 14. The footnote accompanying this passage further clarifies that one of the attendant advantages to certification is a twelve-month bar. *Id.* at slip op.14, n.35 ("Such benefits include a 12-month bar to election petitions under Sec. 9(c)(3) as well as to withdrawal of recognition . . .").

1. In response, the Union argues that *Lamons Gasket* is ambiguous as to when the recognition bar accrues and contends that it should accrue when negotiations begin. To the contrary, the Board must require that the recognition bar accrue from the date of recognition, lest the Board do exactly what *Lamons Gasket* claimed it was not doing: raising the recognition bar above the certification bar. 357 NLRB at slip op. 14. The reason is simple: the recognition bar prohibits employees from filing decertification petitions from the date of recognition.

Accordingly, the bar must accrue on the same day—i.e., the length of the bar must be measured from that date.

The facts of this case illustrate the point. Should Ms. Cox have filed her decertification petition *before* negotiations began (four months after recognition), the petition would be barred. The Union, by taking the position that the recognition bar did not begin to run until the date of negotiations began, effectively bought itself (through its own foot-dragging) four extra months of protection from an employee challenge *in addition* to the recognition bar period. As a result, under the Union's theory, the total time in which employee petitions may be barred will exceed one year. This result is untenable for a number of reasons.

*First*, it makes no logical sense for the time period in which employee petitions are barred to be different than the length by which the recognition bar is measured. In other words, how

could the recognition bar prohibit an election petition immediately after recognition, but not begin to run until negotiations start? Clearly, the date on which employee petitions are barred, and the date on which the recognition bar period runs, must be the same date.

Second, measuring the length of the recognition bar from the date bargaining begins would allow unions to unilaterally extend the bar, and thus suppress employee exercise of free choice, for as long as they please, merely by delaying the start of negotiation. Here, the Union seeks to take advantage of its own foot-dragging to justify quashing Ms. Cox's election petition.

Third, if the recognition bar period does not begin to run until negotiations begin, then the bar will often exceed one year, and thus the length of the certification bar. This case illustrates the point. Indeed, taken to its logical conclusion, the Union's reasoning leads to a situation where the recognition bar may automatically bar any petition for more than a year. The Union here claims it needed nearly four months for post-recognition preparations to bargain for a unit of 110 employees. It is thereby conceivable that a union representing a larger bargaining unit could claim that such preparations could take more than six months post-recognition.

Should a Union wait only one day more than six months to begin bargaining after a voluntary recognition (by engaging in the type of post-recognition preparations the Union did here), it could automatically block any petition filed for more than a year, as the parties would not have bargained for six months. Such a bar therefore would provide greater "attendant legal benefits" than a certification bar, something Lamons Gasket expressly eschewed.

This is plainly an absurd result, as Regional Director (and former Board Member) Dennis Walsh recognized in a similar case also involving the same Employer. In *Americold Logistics LLC*, 2012 NLRB Reg. Dir. Dec., Case No. 04-RD-109029 (Aug. 23, 2013), the union was

recognized in July 2012, but bargaining did not commence until December 2012. In directing an election, Regional Director Walsh noted:

Where the start of bargaining is delayed, the possibility exists for a recognition bar which could extend well beyond a year following recognition and which would effectively grant a voluntarily recognized union greater rights than it would have achieved though Board certification. *This would, in my view, be an anomalous result.* 

*Id.* at \*8 (emphasis added).<sup>5</sup> For these reasons, the recognition bar must begin to run on the date of recognition, and not the date of initial bargaining.

- 2. The Union attempts to justify a longer recognition bar by conflating the obligation to bargain with whether the recognition bar exists. Union Request for Review at pp.11-12. The Regional Director's decision ordering an election has nothing to do with whether or not there remains an obligation to bargain. An obligation for the employer to bargain with the incumbent union remains intact until recognition is either withdrawn when the employer has evidence that a majority of employees no longer support the union (which is not the case here), or until it is ousted by a majority of employees in a secret-ballot election (which the Union is attempting to prevent). The fact that no bar can exist after one year, absent any unfair labor practices on the part of the employer, has no effect on a continuing obligation to bargain.
- 3. The Union argues that the recognition bar should be extended beyond one year in this case because the Act favors collective bargaining. This argument fails for two reasons.

First, the Act also favors collective bargaining after a Board certification at least as much, if not more, than after recognition. The certification bar is one year. Thus, any interest in the Act in encouraging collective bargaining cannot justify a longer period. The Board has noted, in the context of determining whether a union had been given a reasonable time to

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<sup>&</sup>lt;sup>5</sup> While Regional Director Walsh reached the correct result, and recognized the incongruity of the recognition bar running longer than the certification bar, Petitioner notes he incorrectly applied the *Lee Lumber* reasonable time to bargain test. As discussed, such a test is unnecessary because no bar can exist.

bargain, "our experience with the 1-year insulated period for newly certified unions convinces us that 1 year is sufficient to enable unions to demonstrate their effectiveness in negotiations." *Lee Lumber*, 334 NLRB at 402. If one calendar year is sufficient for certified unions, why should voluntarily recognized unions receive more time to protect themselves from a representation challenge? There can be no reasonable answer to this question, and the Union has not offered any reasonable distinction as to why one calendar year is sufficient for a certified union, but a voluntarily recognized union deserves more time to shield itself from a representation challenge. Had the Union chosen its original path, to seek certification at the Americold facility, there would be no question Petition 3 was timely.

Second, collective bargaining is entirely predicated on the exercise of employee free choice enshrined in Section 7 of the Act. See 29 U.S.C. § 159(a) (only "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes[] shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . .").

[T]he Act itself, in its substantive provisions, gives employees the fundamental right to choose whether to engage in collective bargaining or not. The preamble and the substantive provisions of the Act are not inconsistent. Read together, they pronounce a policy under which our nation protects and encourages the practice and procedure of collective bargaining *for those employees who have freely chosen to engage in it*.

Levitz Furniture, 333 NLRB at 731 (Member Hurtgen, concurring) (emphasis added). Absent majority employee support for collective bargaining, nothing in the Act favors it. *See International Ladies Garment Workers v. NLRB*, 366 U.S. 731, 737 (1961) ("There could be no clearer abridgment of § 7 of the Act than for a union and employer to enter a collective bargaining relationship when a majority of employees do not support union representation.").

Accordingly, to say that an interest in collective bargaining trumps employee free choice makes no sense, as the former is dependent on the existence of the latter.

This is why Congress and the Board placed limits on the amount of time a union can engage in bargaining free from an employee's, or a rival union's, challenge to its majority status as an exclusive representative. While the initial choice of employees for that union's representation must be honored for a certain period to effectuate that exercise of employee choice (one year in the case of a certified union), to permit a union to remain in power after it lacks majority employee support serves no legitimate purpose under the Act.

- C. The Regional Director Properly Ordered an Election Because the Board Encourages Parties to Begin Bargaining Immediately After Voluntary Recognition—Something the Union Did Not Do Here.
- 1. One of the Board's stated purposes in *Lamons Gasket* was to encourage employers and unions to come to the table and begin bargaining *immediately* after recognition. To truly understand *Lamons Gasket*, it is helpful to consider the case the Board was overruling. In *Dana Corp.*, 351 NLRB 434 (2007), the Board modified the voluntary recognition bar in order to more finely balance free choice and stability in bargaining relationships. *Lamons Gasket*, 357 NLRB at slip op. 13. *Dana's* balance allowed employees a 45-day "window period" after voluntary recognition during which they could file a decertification petition supported by a 30-percent showing of interest. In order to start the running of the 45-day window period after voluntary recognition, an employer had to post an official Board notice informing employees of their right to seek an election. 357 NLRB at slip op. 1. The Board subsequently reversed course in *Lamons Gasket* and overruled *Dana*, largely because it surmised such a 45-day open period would cause at least a two-month delay in starting negotiations. *Id.* at slip op. 13. The Board was uniquely concerned about bargaining delays immediately following voluntary recognition:

Yet *Dana* virtually guarantees such a delay in serious bargaining and the resulting undermining of the "nascent relationship between the employer and the lawfully recognized union." (citation omitted). The lengthy period of uncertainty created by *Dana* thus unnecessarily interferes with the bargaining process, rendering successful collective bargaining less likely.

Id. Additionally, the Board noted these post-voluntary recognition delays would undermine employee free choice, as employees who support the union want "meaningful representation as soon as practicable," not 60 days later. Id. (citation omitted). It is an improper result to overrule Dana on the basis that a possible 60 day delay in bargaining brought about by employees exercising their free choice under the act undermines representation, while, here, possibly allowing the Union to undermine employee free choice by its own failure to promptly begin bargaining.

The context of *Lamons Gasket* elucidates the only reasonable conclusion here: the voluntary recognition bar cannot extend more than one year post-recognition. To extend the bar past one year gives cover to unions who refuse, for whatever reason, to come to the table immediately after an election, thereby undermining *Lamons Gasket's* stated policy of requiring parties come to the negotiating table promptly after recognition. Such a result rewards a union for its own failure to carry out its fiduciary obligations on behalf of employees, and is incompatible with Congress' intent in Section 9.

The very type of post-recognition delay the Board was attempting to prevent in *Lamons Gasket* was caused by the Union here. The Union was so disorganized post-recognition that it needed two meetings to elect officers and committeemen. It took the Union seven weeks post-recognition to request information from the Employer. Furthermore, the Union's Agent admitted that the Union was not ready to begin bargaining until "mid-September." This nearly four-month delay in coming to the bargaining table not only extended the Union's ability to block any

election sought by Ms. Cox and other employees, but undermined the central purpose of *Lamons Gasket*, which is that employees want "meaningful representation as soon as practicable." 357 NLRB at slip op. 13 (citation omitted).

2. To employ the Union's own reasoning, *Dana* was correctly decided. If the Union was not prepared to begin bargaining for almost four months post-recognition, this would have been enough time under *Dana* for the Employer to post a notice and for employees to exercise their free choice by petitioning for a secret-ballot election. With no bargaining, and a Union that admittedly was unprepared to bargain after recognition, the process announced in *Dana* was correct and could not have "undermined the nascent relationship" between the parties. *Id.* An employer cannot refuse to meet even when the union is unprepared, and the process in *Dana* would not have contributed to any delays. Ms. Cox and her fellow petitioners could have exercised their free choice for a secret ballot while the Union continued to shelter itself in preparation for bargaining. As the allegation of post-recognition delays contributed to the death of *Dana*, it should likewise not prejudice Ms. Cox's petition.

## D. The Board Has Sufficient Remedies to Deal with Employers Who May Refuse to Bargain.

1. If an employer causes a delay by refusing to bargain, a union already has a remedy available to extend the recognition bar—a Section 8(a)(5) unfair labor practice charge. An employer's unfair labor practice has always been the only "unusual circumstance" extending the length of an election bar. *See Mar-Jac Poultry Co.*, 136 NLRB 785, 786 (1962).

Here, the Union hinges its theory of the case on the concept that if it looks like an unfair labor practice and quacks like an unfair labor practice, it is immaterial whether there was no unfair labor practice charge filed or violation found. If the Union honestly believed the Employer was dawdling in order to avoid bargaining, it should have brought a Section 8(a)(5)

charge in order to force the Employer to the table. The Union did not do so. Now, once its representation is challenged by employees more than one year after recognition, the Union is asking the Region to extend the recognition bar past one year, a remedy that could only be warranted if the Union had brought a meritorious charge during the Section 10(b) statute of limitations period. In effect, the Union argues the Region and the Board should find a presumption of guilt against the Employer based on the contents of a prior representation hearing. But a representation hearing is not, and has never been, the proper venue for adjudicating employer and union disputes concerning delays in bargaining, or any other unfair labor practice charges. Without an unfair labor practice motivating employees' dissatisfaction, to extend the recognition bar results only in harming employees who want to exercise their free choice under the Act.

The cases the Union cites support this point. Never has the Board extended an election bar more than one year without an employer committing an unfair labor practice. *See, e.g., Badlands Golf Course,* 355 NLRB No. 42 (June 10, 2010) (bargaining extended after employer violated Sections 8(a)(1) and (5) of the Act); *AT Sys., W., Inc.,* 341 NLRB 57 (2004) (bargaining extended after employer violated Sections 8(a)(1), (2), and (5) of the Act); *Erie Brush & Mfg. Corp.,* 357 NLRB No. 46 (August 9, 2011) (certification year extended after Employer violated Section 8(a)(1) and (5) of the Act), *vacated,* 700 F.3d 17 (D.C. Cir. 2012) (finding no unfair labor practice had occurred). Furthermore, the Union's reliance on *MGM Grand Hotel, Inc.,* 329 NLRB 464 (1999) is misplaced. In *MGM,* the Board did not address the question of whether or not the recognition bar could extend past one calendar year. There the third decertification

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<sup>&</sup>lt;sup>6</sup> Ms. Cox was the only party to file unfair labor practice charges in this petition. She filed charges against the *Employer*, because the Employer illegally refused to allow her to collect signatures for her decertification effort in a company break area, in the company parking lot, during non-work time. NLRB Nos. 25-CA-094901, 25-CA-099346. A complaint was issued against the Employer and the parties entered into a private settlement agreement allowing full Section 7 activity to occur on the property.

petition was filed nine days before the one year anniversary of the voluntary recognition. *Id*. Given that one year had not yet passed, application of the "reasonable time to bargain" test was appropriate.

- 2. The Union constantly engages in a shell game in its Request for Review, arguing that because the parties have not engaged in six months of actual bargaining, the Union should have the time "credited back to it." Union Request for Review, p.16. The fact that the parties had not engaged in six months of actual bargaining is irrelevant under Lamons Gasket. The decision is clear: the Union can shield itself from all representation challenges for six months after the first bargaining session, but "no more than one year" after recognition. 357 NLRB at slip op. 14. Six months after the first bargaining session does not mean the Employer and the Union have to be engaged in bargaining for six continuous or consecutive months. Nor does it mean bargaining has to be spread out over sessions spanning six months. It means the clock starts to run on any automatic bar after the "parties' first bargaining session." *Id.* Additionally, this would not be an equitable result, because, in any case, the record does not support the conclusion the Employer impermissibly refused to bargain. As stated above, the Employer only canceled sessions in January and February because its lead negotiator's wife was undergoing chemotherapy. See Tr. 147:8-12; 152:2-6; 153:20-24, and the parties doubled their meetings in March to account for this unfortunate occurrence.
- 3. The Union wants the Board to gaze into a crystal ball and find "prejudice" because the Employer and the Union *may* have been able to agree on a contract before June 18, 2013, the one year anniversary date. This is nonsensical. There is no way to prove that had the parties actually met between May 22 and June 18, 2013 they would have actually come to an agreement. Additionally, the Union is the party who provided the negotiating dates after one year to the

Employer. Union Ex.2 2A. The Union proposed nine bargaining dates to the Employer in May, five of which were on or after the one-year anniversary of recognition. *Id.* The Union cannot, on the one hand, propose bargaining dates extending past the recognition year and, on the other, argue it was prejudiced because the Employer accepted its proposed dates.

## II. Even If a Recognition Bar Can Extend More Than One Year, The Union Was Given A Reasonable Time To Bargain Under The *Lee Lumber* Factors.

If the Regional Director's decision was incorrect (which it is not), the Board should evaluate whether or not the Union was given a reasonable time to bargain. The election bar should not be extended because the Union was given a reasonable time to bargain under the *Lee Lumber* factors. Three of the *Lee Lumber* factors show the reasonable time to bargain actually elapsed in April, when Ms. Cox filed Petition 2, in *Americold Logistics*, 25-RD-102210, which is still pending before the Board.

# A. The Extensive Passage of Time and the Number of Bargaining Sessions Weigh in Favor of Upholding the Election.

Lee Lumber states "the more time that has elapsed since the parties began to bargain and the more negotiating sessions they have engaged in, the more opportunity they have to reach a contract, and vice-versa." Lee Lumber, 334 NLRB at 404.

1. In *Lee Lumber*, the Board found that five bargaining sessions over the course of two months were not a sufficient number of negotiations. *Id.* at 406. Additionally, the Board has found three meetings over the period of five months insufficient. *Town & Country Plumbing & Heating, Inc.*, 352 NLRB 1212 (2008). In *Am. Golf Corp.*, 355 NLRB No. 42, \*3 (2010), the Board found six to eight meetings over a six-month period weighed in favor of extending the recognition bar. In contrast, the Board has upheld a Regional Director's decision finding that sixteen bargaining sessions over a little less than six months weighed in favor of holding an

election. *Lagrasso Bros., Inc.*, 2012 NLRB Reg. Dir. Dec., Case No. 07-RD-087446, at \*3 (Sept. 26, 2012).

By the time Ms. Cox filed Petition 2, the parties had met in negotiations fourteen (14) separate times. When the Ms. Cox filed her third petition in this case, the parties had met in twenty-one (21) separate sessions. These bargaining sessions were all-day affairs, with the parties meeting in the morning and not adjourning until early afternoon or evening. The Regional Director, in his Decision and Order in Petition 2, even noted the amount of meetings was not "inconsequential." 2012 NLRB Reg. Dir. Dec., Case No. 25-RD-102210, \*7 (May 23, 2013). By the filing of Petition 2 in April 2013, there were enough sessions to allow the parties to fully explore all aspects of a potential agreement. There had also been sufficient bargaining to give employees a reasonable opportunity to observe the Union in action and to make an informed decision about whether they wished to continue with Union representation. The number and depth of the bargaining sessions here weigh in favor of holding the election.

Additionally, the amount of time that had passed since recognition favors upholding the election. When Petition 2 was filed, nearly ten months had passed since recognition. When Ms. Cox filed Petition 3, over a year had passed since recognition. As described above in Section I, B, the amount of time elapsed since the date of recognition should be considered in analyzing the passage of time. Certainly, the extensive passage of time in both Petition 2 and Petition 3 weigh in favor of holding the election.

2. The Union, in its petition for review, contends that bargaining has been unreasonably delayed as a result of scheduling problems attributable to the Employer's lead negotiator canceling sessions in January and February due to family medical issues. There are two issues with this argument.

First, delays in the bargaining here have not been attributable solely to the Employer. As discussed above, the Union delayed bargaining for four months to engage in unnecessary preparations. The Union's disorganization necessitated multiple meetings to elect stewards, and it waited seven weeks following recognition before requesting information from the Employer. Even after it received information from the Employer, it waited until sometime in "mid-September" (the exact date the Union first requested bargaining is not in the record) to request dates for negotiations. The Employer met on the first dates it was provided, because the Union witness admitted the Employer never rejected any dates to bargain. Tr.98:20-25; 99:1-6. In short, the Union bears significant responsibility for bargaining delays.

Second, the Employer canceling sessions in January and February did not hamper bargaining. The meetings were canceled because the Company's lead negotiator's wife had cancer and was starting treatment, not because of any supposed anti-union animus. See Tr. 147:8-12; 152:2-6; 153:20-24. This is supported by the fact scheduling problems did not prevent the parties from fully exploring the possibilities for reaching agreement. After the parties resumed bargaining in March 2013, they were able to agree on forty-seven different provisions of the contract during the ensuing six sessions in March. See Union Ex1.5. Given the amount of time since recognition and the number of bargaining sessions, the reasonable time to bargain had elapsed in April of 2013.

# **B.** The Lack of Complexity in the Bargaining Process and Issues Presented Weighs in Favor of Upholding the Election.

The bargaining in this case has not been particularly complex. None of the issues presented were unusual or difficult to comprehend, and the parties worked from a model agreement in drafting language. Furthermore, they used standard negotiating procedures and have not adopted a bargaining process likely to slow negotiations. This is not a case such as

MGM Grand Hotel, 329 NLRB 464 (1999), in which the parties adopted a complex bargaining process to maximize employee participation. Indeed, in Petition 2, the Regional Director concluded this factor weighed in favor of holding the election. Bargaining did not become more complex between Petition 2 and Petition 3. As the issues are not complex, this factor weighs in favor of finding the parties have had a reasonable time to bargain for an agreement.

# C. The Parties Were Not Close To An Agreement When Petition 2 Was Filed, Thus A Reasonable Time To Bargained Had Elapsed In April 2013.

Where parties have bargained for at least six months and made progress but are not close to reaching agreement, then giving them slightly more time is unlikely to enable them to reach agreement on a contract and this factor will weigh in favor of deciding that a reasonable time to negotiate has elapsed. Where the parties have made considerable progress, are close to reaching an agreement, and appear likely to conclude a contract in the near future, this factor supports a finding that a reasonable time for bargaining has not passed. *Lee Lumber*, *supra*, at 404-405. This case fits into the first category.

When Ms. Cox filed Petition 2, the parties had made substantial progress, but were not close to an agreement. At the time of the filing, the parties had agreed upon 108 individual provisions of the contract, with eight pending issues. The issues pending at that time were:

- 1. Wages;
- 2. Health Insurance;
- 3. Short-Term Disability, Long-Term Disability;
- 4. Dental Insurance;
- 5. Vacations (3 sections; 3 sections have been resolved, not tentatively agreed to);
- 6. Term of Agreement;
- 7. Production Standards & Incentives: and

#### 8. Miscellaneous Proposals;

It took the parties seven more sessions over two months to resolve these issues. The fact the parties were not close to an agreement when Petition 2 was filed shows that by the time Petition 3 had been filed, the reasonable time to bargain had elapsed in April of 2013.

Accordingly, as the reasonable time to bargain elapsed back in April, the Board should uphold the Regional Director's direction of an election.

### **CONCLUSION**

With the free choice of the employees at stake, the Union failed to meet its burden of proof demonstrating the recognition bar should be extended. Nor can it, because such a result would violate the rules and policies put forth in *Lamons Gasket*, as well as Congress' policies set forth in Section 9 of the Act. As more than one year has passed, a bar can no longer exist to block Ms. Cox's petition. The Board should uphold the Regional Director's Direction of Election.

/s/ Aaron B. Solem

Aaron B. Solem c/o National Right to Work Legal Defense Foundation 8001 Braddock Rd, Suite 600 Springfield, VA 22209 Attorney for Petitioner

### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document, described as the

Petitioner's Brief, was served on the parties via e-mail to:

Rik Lineback Regional Director, National Labor Relations Board Region 25, Sub-Region 33, Rik.Lineback@nlrb.gov

Liz Vladeck Attorney for the Intervenor Cary Kane, LLP 1350 Broadway, Suite 1400 New York, New York 10018 Lvladeck@carykane.com

Sheldon Kline Attorney for the Employer Sheppard Mullin Richter & Hampton, LLP 1300 I Street, Northwest, 11th Floor East Washington, D.C. 20005 SKline@sheppardmullin.com

Dated: September 23, 2013

/S/ Aaron B. Solem

Aaron B. Solem c/o National Right to Work Legal Defense Foundation 8001 Braddock Rd, Suite 600 Springfield, VA 22209 Attorney for Petitioner